Supreme Court, U.S.
FILED
DEC 5 - 2008
OFFICE OF THE CLERK

114

No. 08-221

In the Supreme Court of the United States

MEADOWLAKE CORPORATION, et al.,
Petitioners,

v.

STATE OF OHIO, ex rel. NANCY ROGERS,
ATTORNEY GENERAL OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, unlike civil forfeitures that are historically regarded as punishment and tied to the commission of a crime, a civil penalty assessed for violations of Ohio's Safe Drinking Water Act is outside the purview of the Eighth Amendment Excessive Fines Clause.

2. Assuming the Eighth Amendment Excessive Fines Clause applies to some civil penalties, whether a civil penalty that is clearly proportional to the offense in question and amounts to only 1.2 percent of the maximum penalty authorized by law is consistent with the Excessive Fines Clause.

3. Whether, consistent with the Fourteenth Amendment Due Process Clause, a trial court can limit a corporate defendant's ability to participate in court proceedings where the defendant, by its own inaction and without justification, fails to secure counsel before a trial scheduled months in advance.

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INTRODUCTION

Petitioners Meadowlake Corporation and Meadowlake Limited, LLC (collectively "Meadowlake") ask this Court to review an Ohio court of appeals decision upholding the imposition of a $300,000 civil penalty for violations of Ohio safe drinking water laws and regulations. Specifically, Meadowlake contends that the civil penalty violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and that the case presents an opportunity for this Court to clarify its excessive fines jurisprudence. Meadowlake also asserts a Fourteenth Amendment due process claim, alleging that it was unconstitutionally denied the opportunity to present a defense and to participate in an evidentiary hearing.

In spite of Meadowlake's best efforts to portray the questions presented as novel issues that would allow this Court to clarify an area of constitutional law, the petition fails to articulate any legal issue meriting this Court's attention.

Meadowlake's excessive fines argument fails for two main reasons. First, this Court has never held that civil penalties imposed for violations of civil law implicate the Eighth Amendment Excessive Fines Clause. Contrary to Meadowlake's assertions, lower courts are not divided on this issue. Second, even if this Court were to conclude that the Excessive Fines Clause applies to certain civil penalties, such a determination would not change the outcome of this case because this penalty was not excessive. The civil penalty imposed is well within the range of civil penalties authorized by the Ohio General Assembly

for violations of Ohio's safe drinking water laws. Moreover, the trial court exercised its informed discretion in deciding to impose a civil penalty that amounted to a mere 1.2 percent of the maximum penalty authorized by Ohio law.

Meadowlake's due process claims do not merit this Court's attention because they dispute the appellate court's proper application of long-established and clear principles of constitutional law. Meadowlake does not even allege any unresolved due process issue or point to any confusion among lower courts with respect to these claims; it simply disagrees with the lower court's holding. But the appellate court's decision was correct: The trial court did not violate Meadowlake's due process rights either by refusing to allow Meadowlake additional time to secure counsel—because Meadowlake's lack of counsel was not due to extenuating circumstances beyond its control—or by denying Meadowlake's request for a *post*-trial evidentiary hearing that would have essentially "continued" the trial. In fact, Meadowlake simply chose to proceed without counsel at trial and thereby failed to take advantage of the meaningful opportunities the trial court offered for Meadowlake to exercise its due process rights.

For these reasons, Meadowlake does not present any questions meriting this Court's review.

COUNTERSTATEMENT

A. Ohio EPA reclassified Meadowlake's public water system, thereby requiring Meadowlake to comply with heightened monitoring and treatment requirements.

Meadowlake Golf & Swim Club (the "Club") consists of a golf course, swimming pool, pro shop, restaurant, snack shop, and banquet facility. *Ohio ex rel. Dann v. Meadowlake Corp.*, No. 2006 CA 00252, 2007 Ohio App. Lexis 5949, at *1 (Ohio Ct. App. Dec. 17, 2007). Meadowlake Limited, a corporation established in 2001, operates the Club, and Meadowlake Corporation owns the property where the Club is located. *Id.* Roy Barr is the Chief Executive Officer ("CEO") of Meadowlake Limited and Meadowlake Corporation. *Id.* at *2.

A well located in a farmhouse basement on Meadowlake Corporation's property supplies water to the farmhouse, pool, and club house. *Id.* In 1995, the Ohio Environmental Protection Agency ("Ohio EPA") determined that this water supply constituted a public water system ("PWS"), meaning that Meadowlake had to obtain an operational license from Ohio EPA. *Id.* Meadowlake obtained the required PWS licenses from 1996 to 1998, but did not apply for or receive a license after 1998. *Id.*

In August 1999, the Director of Ohio EPA ("Director") issued a proposed action changing Meadowlake's PWS designation from "Ground Water" to a water source "under the influence of surface water." *Id.* The proposed change in classification would mean that, instead of providing one bacteria sample per quarter and one nitrate

sample per year, Meadowlake would have to provide four bacteria samples and one nitrate sample each month. *Id.* at *3.

Later that month, Ohio EPA issued a final designation of the water source as under the influence of surface water, effective September 27, 1999. *Id.* at *2-3. Ohio EPA advised Meadowlake that it had eighteen months to bring the PWS into compliance in one of the following five ways: (1) installing approved filtration treatment and disinfection in compliance with Ohio Administrative Code § 3745-81-73; (2) eliminating the well's construction and isolation defects so that the well can be re-evaluated and redesignated as ground water; (3) abandoning wells designated as surface water and installing adequate approved ground-water sources; (4) abandoning surface-water sources and installing an approved hauled-water system; or (5) abandoning surface-water sources and purchasing water from an approved PWS. *Id.* at *3-4.

Beginning in November 1999, Ohio EPA sent Barr numerous letters informing him that Meadowlake's PWS violated the Ohio Administrative Code. *Id.* at *4. In February 2001, Ohio EPA sent the Club a warning letter advising it to either "receive a ground water designation for [its] sources or install surface water treatment" by March 27, 2001. *Id.*

In May 2002, the Director issued Unilateral Administrative Findings and Orders to Barr, as the Club's owner, stating in relevant part:

> I am writing with regard to the violations of Ohio's safe drinking water rules at the Meadowlake Golf & Swim's public water system. Specifically, you have failed to comply with source water designation requirements, failed to install filtration treatment, failed to monitor for total coliform bacteria and nitrate, failed to prepare and maintain a written sample siting plan, failed to issue public notices, and operated a public water system without a license. These violations present a serious health risk to Meadowlake Golf & Swim's consumers.

Id. at *4-5. Barr appealed the Findings and Orders, but the appeal was dismissed after the Director revoked the Findings and Orders. *Id.* at *5.

B. An Ohio court found that Meadowlake committed more than 1000 violations of Ohio's Safe Drinking Water Act, awarded Ohio injunctive relief, and imposed a $300,000 civil penalty.

The State of Ohio filed a thirteen-count complaint against Meadowlake in the court of common pleas, alleging that, as the owner and operator of a PWS, it was in violation of Ohio Revised Code, Chapters 6019 and 6111, and the related rules. The complaint alleged that Meadowlake had failed to: (1) maintain a public water license; (2) maintain a written sample siting plan; (3) adequately sample the water for nitrates and bacteria; (4) notify the public of their violations; and (5) comply with water-well standards. *Id.* at *5. Ohio sought injunctive relief and a $25,000 civil

penalty for each day of Meadowlake's violation. *Id.* at *5-6.

The trial court allowed Barr to intervene as a defendant because he individually owns 100 percent of Meadowlake Corporation and 99 percent of Meadowlake Limited. *Id.* at *6. The trial court also bifurcated the case, over the State's objection.

A jury trial began in January 2006 on the sole issue of whether Meadowlake owned and/or operated a PWS. *Id.* The trial court declared a mistrial, however, because the "inappropriate and extra-issue scope of the comments of Roy Barr prejudiced the jury to such an extent that 'the ends of public justice' could not be attained in this matter without discontinuing the trial." *Id.*

The trial court set a new trial date of May 30, 2006, giving the parties approximately eighty days' advance notice. *Id.* at *6, *13. That same day, Meadowlake's counsel sought leave to withdraw because Meadowlake had failed to make any payments on its account since mid-January or "to make any satisfactory provisions for payment of [its] substantial account balance." *Id.* at *7 (internal quotation omitted). Meadowlake did not object to its counsel's withdrawal. In fact, Barr announced that counsel was terminated as of the date of counsel's motion. *Id.* Meadowlake informed the trial court that Barr would be out of state during the winter for health reasons, but it would retain new counsel once Barr returned to Ohio in April 2006. *Id.*

The trial court granted Meadowlake's counsel leave to withdraw on March 23, 2006, specifically noting that Meadowlake, as a corporate entity, would

not be able to proceed without representation. *Id.* at *7-8. The trial court's order stated:

> Therefore, the Defendants are ordered to immediately secure the representation of other counsel in order to proceed in this matter, or if they choose to waive the representation of counsel to understand that any non-attorney even though an officer of any of the Defendant corporations or an appointed agent of any of the Defendant corporations could not file pleadings, present further defense regarding the issue before the court, or otherwise represent the interests of the corporate defendants.

Id. at *8.

On the State's motion, the trial court reconsidered its decision to allow a jury trial. On May 19, 2006, the trial court ordered a bench trial and again confirmed the May 30, 2006, trial date. *Id.*

No counsel entered an appearance on Meadowlake's behalf or requested a stay before the trial date. *Id.* at *13. Meadowlake was not represented by counsel at trial. *Id.* at *8. However, Meadowlake did secure counsel *after* the trial concluded. *Id.* at *9.

After the trial's conclusion, but before the trial court entered judgment, Meadowlake's new counsel filed a July 2006 motion for an evidentiary hearing to give Meadowlake an opportunity to present post-trial evidence. *Id.* The trial court overruled the motion, stating:

> The Defendants, having been advised of the consequences of their failure to hire new counsel to appear at the May 30, 2006 trial delayed such hiring themselves. The attorney, whom the Defendants state was unavailable to appear at the trial due to serious personal injuries, had never entered an appearance in this matter and was never counsel of record in the action. Prejudice to the Defendants, if any, was caused by their own acts. The Defendants here, in fact, are requesting a post-trial continuance of the matter.

Id. at *9-10.

The trial court entered judgment, finding that Meadowlake owned and/or operated a PWS, had violated Ohio law, and had committed more than 1000 violations of Ohio's Safe Drinking Water Act ("Act"), codified at Ohio Revised Code, Chapter 6109. *Id.* at *10. The court granted Ohio injunctive relief and imposed a $300,000 civil penalty. *Id.*

C. An Ohio appeals court affirmed the trial court's judgment, and the Ohio Supreme Court denied review.

Meadowlake appealed the trial court's judgment, raising four assignments of error: (1) the trial court should not have proceeded to trial knowing that Meadowlake was not represented by counsel for reasons beyond its control; (2) the trial court improperly denied Meadowlake's post-trial motion for an evidentiary hearing; (3) the trial court improperly denied Meadowlake's request for a jury trial; and (4) the $300,000 civil penalty was

excessive, arbitrary, and inappropriate, and also violated Meadowlake's due process rights. *Id.* at *11. The court of appeals overruled each assignment of error, affirming the trial court's judgment. *Id.* at *27.

The Ohio Supreme Court denied discretionary review of Meadowlake's appeal from the intermediate appellate court's judgment, *Ohio ex rel. Dann v. Meadowlake Corp.*, 886 N.E.2d 872 (Ohio 2008), and Meadowlake filed a petition for certiorari with this Court.

REASONS FOR DENYING THE WRIT

Meadowlake asks this Court to grant certiorari in order to determine whether the Excessive Fines Clause applies to the civil penalty imposed in this case. Meadowlake's excessive fines argument fails for two reasons. First, this Court has never held that civil penalties implicate the Excessive Fines Clause, and no confusion exists among the lower courts on this issue. Second, even if the Court were interested in clarifying the applicability of the Excessive Fines Clause to civil penalties, these are not facts upon which the Court should reconsider its excessive fines jurisprudence: Even if this Court were to conclude that the Excessive Fines Clause applies to some civil penalties, such a determination would not change the outcome of this case because the penalty at issue was not excessive by any definition.

Moreover, Meadowlake's due process claims do not merit this Court's attention, because the appellate court properly applied long-established and clear principles of constitutional law in holding that

the trial court did not deny Meadowlake its due process rights.

A. The Eighth Amendment Excessive Fines Clause does not apply to the civil penalty imposed for Meadowlake's violations of Ohio's Safe Drinking Water Act.

The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Although this Court has applied the Excessive Fines Clause when reviewing the constitutionality of certain civil forfeitures of property, this Court has never held that the Excessive Fines Clause applies to a civil penalty. Moreover, this case provides no reason for the Court to consider expanding the scope of the Excessive Fines Clause.

1. This Court has never applied the Excessive Fines Clause to a civil penalty.

This Court generally applies the Eighth Amendment in the context of criminal proceedings. The Eighth Amendment's text, however, is not explicitly confined to criminal prosecutions. See *Austin v. United States*, 509 U.S. 602, 608 (1993). Accordingly, this Court has recognized the Eighth Amendment's applicability in limited civil contexts. In *Carlson v. Landon*, 342 U.S. 524 (1952), for example, the Court applied the Excessive Bail Clause to a civil proceeding involving an alien's detention pending a determination of deportability. *Id.* at 544-46. In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court recognized that although the Cruel

and Unusual Punishments Clause's original design was "to limit criminal punishments," *id.* at 668, "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment," *id.* at 669 n.37. Similarly, the Court has applied the Excessive Fines Clause in limited civil contexts.

Although Meadowlake correctly identifies two cases where this Court has found that the Excessive Fines Clause limits the government's ability to collect cash as a form of civil punishment, see *United States v. Bajakajian*, 524 U.S. 321 (1998); *Austin*, 509 U.S. 602, neither case holds that the Excessive Fines Clause applies to civil penalties like the one at issue here. *Austin* and *Bajakajian* instead stand for the narrow proposition that the Excessive Fines Clause applies in the limited context of *civil forfeitures* awarded under statutes authorizing the administrative seizure of property related to the commission of a *crime*.

In *Austin*, the Court found that a civil forfeiture statute can trigger the Excessive Fines Clause, even if the forfeiture is not entirely motivated by punitive objectives. 509 U.S. at 610-611. In deciding whether to apply the Excessive Fines Clause, the Court asked not whether the forfeitures were criminal or civil, but whether they constituted punishment. *Id.* at 610. If a forfeiture "can only be explained as serving in part to punish," and not as wholly remedial, the Excessive Fines Clause applies. *Id.* Examining the specific statute in question, the Court "[found] nothing in these provisions or their legislative history to

contradict the historical understanding of forfeiture as punishment." *Id.* at 619. To the contrary, the statute's "innocent owner" defense to forfeiture "focus[ed] the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." *Id.* (innocent-owner defense indicates "congressional intent to punish only those involved in drug trafficking"). The Court noted that "Congress [chose] to tie forfeiture directly to the commission of drug offenses" and then concluded that the provision's legislative history confirmed its punitive nature. *Id.* at 620.

Five years later, the Court for the first and only time struck a civil forfeiture statute for violating the Excessive Fines Clause. *Bajakajian*, 524 U.S. 321. The *Bajakajian* Court had "little trouble concluding that the forfeiture of currency ordered by [the statute] constitutes punishment" because the statute directs courts to impose a forfeiture "at the culmination of a criminal proceeding and requires conviction of an underlying felony." *Id.* at 328 (noting that the statute would not allow courts to impose a forfeiture on an innocent party).

Meadowlake cites a single Eighth Circuit opinion as evidence of confusion among lower courts about the Excessive Fines Clause's applicability to civil penalties. Pet. at 11; see *United States v. Lippert*, 148 F.3d 974 (8th Cir. 1998). The Eighth Circuit in *Lippert* voiced uncertainty about whether the Excessive Fines Clause applies to civil penalties in the Anti-Kickback Act, codified at 41 U.S.C. § 54. *Id.* at 978. According to *Lippert*, *Austin*'s "expansive test" brings within the Excessive Fines Clause's purview any civil penalty that "is intended to serve

in part as punishment," *id.* at 977, while *Bajakajian* suggests that penalties "serv[ing] the remedial purpose of reimbursing the Government for losses," *id.* at 978 (internal quotation omitted), "may not be subject to the Excessive Fines Clause at all," *id.* at 978.

The Eighth Circuit in *Lippert* misread *Austin* and *Bajakajian* in two ways. First, it assumed that the Court's analysis in *Austin* and *Bajakajian* applies to all civil penalties, whereas the holdings are actually limited to civil *forfeitures*. Second, *Bajakajian*'s suggestion that civil forfeitures remedying a governmental loss are not subject to the Excessive Fines Clause is true only if those forfeitures are not considered punishment. In any event, neither *Austin* nor *Bajakajian* suggested that a civil penalty, even one with purely punitive purposes, is subject to the Excessive Fines Clause.

The Court has not analyzed whether any other civil forfeitures constitute excessive fines since *Bajakajian*, and it has never indicated that the Excessive Fines Clause applies to civil penalties other than civil forfeitures imposed under the circumstances described above.

2. This Court's reasons for applying the Excessive Fines Clause to civil forfeitures in *Austin* and *Bajakajian* do not apply to this civil penalty.

Even if this Court were interested in expanding the Excessive Fines Clause's civil applicability, *none* of the considerations that motivated the Court to apply the Excessive Fines Clause to civil forfeitures in *Austin* and *Bajakajian* are present in this case.

The Court's holding in *Austin* turned on the punitive character of in personam forfeitures at the time of the Eighth Amendment's enactment. Against the backdrop of this "historical understanding of forfeiture as punishment," the Court looked for any contrary evidence of legislative intent to author a purely remedial statute. *Austin*, 509 U.S. at 619. Unable to find evidence of such intent, the Court concluded that the statutory forfeitures in *Austin*, and later the forfeitures in *Bajakajian*, were clearly punitive because they were directly tied to the commission of a criminal offense. *Id.* at 620 (forfeiture was linked closely to culpability); *Bajakajian*, 524 U.S. at 328 (statute does not authorize imposition of forfeiture on innocent parties). By contrast, in this case, the Act's language and legislative history clearly reflect the Ohio General Assembly's intent to impose a *civil* penalty and do not in any way tie the fine to the commission of a *criminal* offense.

The trial court ordered Meadowlake to pay a civil penalty pursuant to Ohio's Safe Drinking Water Act. When statutory language "conveys a clear, unequivocal, and definite meaning, . . . the statute must be applied according to its terms." *Columbus Gas Transmission Corp. v. Levin*, 882 N.E.2d 400, 406 (Ohio 2008). This civil statute authorizes courts to impose civil penalties for violations. Ohio Revised Code § 6109.33 clearly states that "[a]ny person who violates section 6109.31 of the Revised Code shall pay a *civil* penalty" and that "[s]uch an action is a *civil* action, governed by the Rules of *Civil* Procedure and other rules of practice and procedure applicable to *civil* actions." *Id.* (emphasis added). This language reflects the Ohio General Assembly's intent

to authorize only the imposition of civil penalties in civil actions for violations of Ohio's safe drinking water laws.

The Act's purpose further supports the conclusion that it authorizes only civil penalties. The Act strives "to protect the public health and welfare and to enable the state to assume and retain primary enforcement responsibility under the [federal] Safe Drinking Water Act," codified at 42 U.S.C. § 300(f). Ohio Rev. Code § 6109.03; see *id.* § 6109.01(D). It authorizes the imposition of civil penalties as a tool to implement this regulatory scheme. See *Ohio ex rel. Brown v. Howard*, 444 N.E.2d 469, 471 (Ohio Ct. App. 1981) (noting in the context of Ohio's water pollution control laws that "[c]ivil penalties can be used as a tool to implement a regulatory program"). These civil penalties are meant to deter conduct contrary to that scheme and, to be effective, "should be large enough to hurt the offender." *Id.*; see also *Ohio ex rel. Celebrezze v. Thermal-Tron, Inc.*, 592 N.E.2d 912, 917 (Ohio Ct. App. 1992). As Ohio courts have noted, "civil penalties, imposed for violations of environmental regulations, are not penal but primarily deterrent in nature." *Ohio ex rel. Montgomery v. Maginn*, 770 N.E.2d 1099, 1104 (Ohio Ct. App. 2002) (citing *Ohio ex rel. Brown v. Dayton Malleable*, 438 N.E.2d 120, 125 (Ohio 1982)).

A comparison of the Act to other environmental laws also demonstrates the Ohio General Assembly's intent to authorize only civil penalties for safe drinking water violations. When the General Assembly has "used certain language in . . . one instance and wholly different language in [another],

it will . . . be presumed that different results were intended." *Metro. Sec. Co. v. Warren State Bank*, 158 N.E. 81, 83 (Ohio 1927). The Ohio General Assembly regularly distinguishes between civil and criminal penalties when enacting environment laws. See Ohio Rev. Code Chapter 3704 (delineating separate criminal and civil penalties for air pollution control violations); Ohio Rev. Code Chapter 3751 (delineating separate criminal and civil penalties for hazardous substances violations); Ohio Rev. Code Chapter 6111 (delineating separate criminal and civil penalties for water pollution control violations). Similarly, the federal Safe Drinking Water Act—the very basis for Ohio's Safe Drinking Water Act—provides for enforcement primarily by administrative order or civil action, but expressly authorizes criminal sanctions in two instances. 42 U.S.C. § 300h-2 (willfully violating underground injection control program laws); 42 U.S.C. § 300i-1 (tampering with a PWS with intent to harm persons). These criminal penalties authorized by other environmental laws stand in stark contrast to the Act's description of *civil* penalties. The Ohio General Assembly understood the difference between authorizing civil and criminal penalties for environmental violations and decided to authorize only civil penalties under the Act, making no mention of criminal penalties.

Moreover, none of the Court's other reasons for analyzing civil forfeitures under the Excessive Fines Clause are present here. Unlike the civil forfeitures at issue in *Austin* and *Bajakajian*, there is no evidence that civil penalties like those authorized under the Act were historically considered punitive. In fact, money penalties have not "historically been

viewed as punishment." *Hudson v. United States*, 522 U.S. 93, 104 (1997). As the statutory language, the character of the overall regulatory scheme, and the legislative intent demonstrate, the Act's penalties are intended to be civil and are not tied to the commission of a criminal offense. In light of these distinctions between the civil penalties here and the civil forfeitures in *Austin* and *Bajakajian*, it is clear that these penalties are not within the Excessive Fines Clause's purview.

3. Meadowlake's civil penalty is not sufficiently punitive to transform it into a criminal penalty.

Although the Act's penalty provisions are clearly intended to be civil, are not of a type historically regarded as punitive, and are not tied to the commission of a crime, this Court nevertheless could decide to evaluate whether the $300,000 civil penalty is so severe as to amount to a criminal penalty. Even if the Court were to engage in such an analysis, however, the civil penalty imposed on Meadowlake is not even arguably severe enough to transform it into a criminal penalty. This further counsels against granting Meadowlake's petition.

This Court has set forth a clear test, in the context of Fifth Amendment jurisprudence, for determining whether a statutory scheme is so punitive in purpose or effect that it transforms what was clearly intended as a civil remedy into a criminal penalty. The Court considers seven factors, evaluating each in relation to a statute's face:

> (1) whether the sanction involves an affirmative disability or restraint;

> (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Hudson, 522 U.S. at 99-100 (internal quotations omitted) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). However, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 100 (internal quotation omitted) (no double jeopardy violation where liability and civil penalty were imposed after conviction and criminal penalty, even though both penalties pertained to the same lending transactions).

Application of the *Hudson* test to Ohio's Safe Drinking Water Act reveals that, consistent with the statutory scheme, the trial court imposed a civil penalty that is not even arguably punitive enough to amount to a criminal penalty.

First, although the trial court in this case enjoined Meadowlake to comply with Ohio's Safe Drinking Water Act, the underlying action involves no affirmative disability or restraint. In fact, Congress' decision to give the U.S. Environmental

Protection Agency, an administrative agency, authority under the federal Safe Drinking Water Act to initiate actions involving similar penalties is prima facie evidence that Congress intended to provide for a civil sanction. *Id.* at 103. Similarly, the Ohio General Assembly clearly intended the Act's penalties to be civil, for the reasons described above. See Ohio Rev. Code § 6109.33.

Second, monetary penalties historically have not been considered punishment and have been enforceable through civil proceedings for centuries. *Id.* at 104.

Third, Ohio Revised Code Chapter 6109 does not include a scienter requirement; it is a strict liability statute. The Act's plain language states that "[n]o person shall violate this chapter, any rule adopted under it, or any order or term or condition of a license . . . under it." Ohio Rev. Code § 6109.31; see *Meadowlake Corp.*, 2007 Ohio App. Lexis 5949, at *19-20; *United States v. Liviola*, 605 F. Supp. 96, 100 (N.D. Ohio 1985) (Resource Conservation and Recovery Act, like Clean Air Act and Clean Water Act, imposes strict liability because Congress made intent irrelevant to the question of civil penalties); *State v. Cheraso*, 540 N.E.2d 326, 328-329 (Ohio Ct. App. 1988) (statute stating that "[n]o person shall" take some action without reference to degree of culpability clearly indicates legislature's intent to impose strict liability). The trial court did find that Meadowlake's violations of the Act were intentional and longstanding. This finding, however, was not a prerequisite for imposing a civil penalty under the Act. Instead, the trial court considered these facts in the context of one factor used to determine the

proper amount of a civil penalty under Ohio law—the degree of a violator's recalcitrance, defiance, or indifference to legal requirements. See *Ohio v. Tri-State Group, Inc.*, No. 03 BE 61, 2004 Ohio App. Lexis 4036, at *49 (Ohio Ct. App. Aug. 20, 2004) (citing *Dayton Malleable*, 438 N.E.2d 120).

Fourth, although civil penalties imposed for violations of Ohio environmental laws are "primarily deterrent in nature," *Maginn*, 770 N.E.2d at 1104, the fact that a penalty may deter Meadowlake and similarly situated owners and operators from similar violations is not determinative. Rather, labeling a civil penalty as "criminal" simply because it has a deterrent effect would seriously undermine the government's ability effectively to regulate the public drinking water. *Id.* at 105 ("To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation."). Importantly, *Hudson* specifically notes that "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 100 (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)).

Fifth, the Act authorizes penalties for behavior that is not independently criminal. Notably, even where the conduct for which sanctions may be imposed "may also be criminal . . . [t]his fact is insufficient to render the money penalties . . . criminally punitive." *Id.* at 105.

Sixth and seventh, the Act authorizes civil penalties as a tool for implementing its regulatory scheme to "protect the public health and welfare and

to enable the state to assume and retain primary enforcement responsibility under the [federal] Safe Drinking Water Act." Ohio Rev. Code § 6109.03; see *Howard*, 444 N.E.2d at 471. Although the penalties are meant to deter similar conduct, "the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals." *Hudson*, 522 U.S. at 105 (internal quotation and citation omitted).

These factors, considered alongside the Act's plain language, reveal that the civil penalties at issue do not fall within the Excessive Fines Clause's purview. Consequently, the facts of this case do not require the Court to reconsider the Excessive Fines Clause's scope or to expand its applicability to a civil penalty that bears no resemblance to the civil forfeitures analyzed in *Austin* and *Bajakajian*.

B. Even if the Court were to apply the Excessive Fines Clause, the civil penalty was not excessive by any definition.

Even if this Court were inclined to reconsider the scope of the Excessive Fines Clause, the Court should not grant certiorari in this particular case because the penalty levied against Meadowlake was not excessive by any definition. In other words, regardless of how the Court might interpret the Excessive Fines Clause, granting Meadowlake's petition would not change the result in this action. The record demonstrates that the trial court exercised its informed discretion to impose a civil penalty that was well within the range of civil penalties authorized by the Ohio General Assembly. Contrary to Meadowlake's suggestion, this Court already has established a clear standard for

analyzing fines under the Excessive Fines Clause, and lower courts are not confused about how to apply that standard.

1. The civil penalty was not grossly disproportional to the gravity of Meadowlake's violations.

Under the "constitutional excessiveness standard" in *Bajakajian*, "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." 521 U.S. at 334. Reasoning that the "principle of proportionality"—that is, that "[t]he amount of [a] forfeiture must bear some relationship to the gravity of the offense that it is designed to punish"—is the touchstone of an inquiry under the Excessive Fines Clause, the Court considered two sources when deciding the degree of proportionality that the Constitution requires. *Id.* First, drawing on its analysis of the Cruel and Unusual Punishments Clause, the Court observed "that judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 336 (citations omitted). Second, the Court noted "that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.* For these reasons, the Court concluded that it would be inappropriate to "requir[e] strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense" and instead adopted "the standard of gross disproportionality" used to analyze cruel and unusual punishment challenges. *Id.*

The amount of the civil penalty imposed here is not grossly disproportional to the gravity of

Meadowlake's offense. The Ohio General Assembly made the initial judgment about the appropriate penalty for violations of the Ohio Safe Drinking Water Act, authorizing a range of civil penalties for violations. See *id.* at 336. The Act permits courts to impose a penalty of up to $25,000 for *each* violation and defines each day of noncompliance as a separate violation. Ohio Rev. Code §§ 6109.31; 6109.33. Within this framework, the trial court then made the second judgment about the appropriate amount of Meadowlake's penalty. Cf. *Bajakajian*, 524 U.S. at 336. After finding that Meadowlake committed more than 1000 violations, the trial court imposed a $300,000 civil penalty. *Meadowlake Corp.*, 2007 Ohio App. Lexis 5949, at *10. Assuming that Meadowlake committed *only* 1000 violations and that each of those violations lasted *only* one day—although in fact some of Meadowlake's violations continued for years—the trial court could have imposed a maximum penalty of $25 million under the Act. Instead the trial court imposed a penalty amounting to a mere *1.2 percent* of the maximum authorized penalty, penalizing Meadowlake an average of $300 per violation.

These facts are easily distinguishable from the broad, unrestricted language of the forfeiture statute at issue in *Bajakajian*, which required a "court, in imposing sentence on a person convicted of an offense . . . [to] order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 524 U.S. 321, 325 (quoting 18 U.S.C. § 982(a)(1)). In *Bajakajian*, the defendant violated a law requiring customs declarations of any cash amount exceeding $10,000 by failing to report the

entire $357,144 he was bringing into the United States. *Id.* at 324, 337-338. The government seized the entire amount pursuant to the broad language of the forfeiture statute. *Id.* at 324-325. The Court found that the seizure violated the Excessive Fines Clause for two reasons. First, the defendant was not within the class of persons for whom the statute was principally designed—money launderers, drug traffickers, and tax evaders—because he was bringing legally obtained money into the United States for a legal purpose. *Id.* at 338. Second, the defendant's violation caused minimal harm, affecting only the government and doing so only in a relatively minor way. *Id.* at 339.

Unlike the defendant in *Bajakajian*, Meadowlake is within the precise class of persons that Ohio's Safe Drinking Water Act is designed to regulate. Moreover, unlike the forfeiture statute in *Bajakajian*, Ohio Revised Code § 6109.33 establishes a ceiling on the civil penalty a trial court can impose, and Meadowlake's penalty is well below that ceiling. Finally, Meadowlake caused more than minimal harm. Although the State of Ohio could not determine the full extent of the harm caused because Meadowlake never submitted the statutorily required sampling data, Meadowlake created a serious risk to the public health by failing to monitor and treat water from its PWS before serving that water to the public. This risk to the public health was augmented by the intentional and long-standing nature of Meadowlake's violations.

Consistent with the Act, the trial court properly exercised its informed discretion to determine the amount of the civil penalty in accordance with

factors articulated by the Ohio Supreme Court. See *Tri-State Group, Inc.*, 2004 Ohio App. Lexis 4036, at *49 (citing *Dayton Malleable*, 438 N.E.2d 120). The trial court considered several factors established at common law when deciding to impose a civil penalty well below the statutory maximum. Such factors included: (1) the harm (or threat of harm) to the environment caused by Meadowlake's actions; (2) Meadowlake's degree of "recalcitrance, defiance, or indifference"; (3) the economic benefit Meadowlake accrued due to its violations; and (4) unusual or extraordinary costs to enforce the statute. *Meadowlake Corp.*, 2007 Ohio App. Ct. Lexis 5949, at *21-25; see *Tri-State Group, Inc.*, 2004 Ohio App. Lexis 4036, at *49. The trial court also considered the extent of Meadowlake's business operations. Unlike the statute authorizing the civil forfeiture in *Bajakajian*, Ohio's Safe Drinking Water Act did not give the trial court broad authority to seize all of Meadowlake's real or personal property as instrumentalities used to commit Meadowlake's violations.

Meadowlake's civil penalty is not grossly dispropriational to the gravity of its offense. The trial court deferred to the legislature's initial judgment about the appropriate penalties for violations of the Act, then exercised its informed discretion to penalize Meadowlake in an amount equal to a mere 1.2 percent of the maximum authorized penalty. Furthermore, Meadowlake risked the public health by failing over a significant period of time to monitor and treat its PWS in accord with Ohio law. For these reasons, this civil penalty was not clearly disproportional to the gravity of

Meadowlake's violations of Ohio's Safe Drinking Water Act.

2. The lower courts' reliance on different factors to evaluate excessiveness does not indicate confusion about the standard for evaluating whether a fine is unconstitutionally excessive.

Although Meadowlake acknowledges the proportionality test set forth in *Bajakajian*, it expresses concern that "the Circuit courts and the District courts that have analyzed the excessiveness of these types of fines have used a range of analyses in coming to their conclusions." Pet. at 15. To the contrary, lower courts are clear about the fact that a civil forfeiture violates the Excessive Fines Clause if the amount of the forfeiture is grossly disproportional to the offense it is designed to punish. Lower courts simply have considered a variety of factors, as the Court itself did in *Bajakajian*, to evaluate whether a particular fine is grossly disproportional to the gravity of an offense in a particular context.

Meadowlake cites five cases as evidence that lower courts have applied different tests for evaluating the excessiveness of a fine post-*Bajakajian*. Three of these cases illustrate applications of *Bajakajian*'s gross disproportionality test. *Towers v. City of Chicago*, 173 F.3d 619, 624-26 (7th Cir. 1999) (considering the gravity of the offense, the offenders' culpability, the harm caused by the offense, and the amount of the fine in relation to the gravity of the offense); *Tyson v. Amerigroup Illinois, Inc.*, 488 F. Supp. 2d 719, 742-48 (N.D. Ill. 2007) (considering a variety of factors when

performing a gross disproportionality inquiry); *Cox for U.S. Senate Comm. v. FEC*, No. 03 C 3715, 2004 U.S. Dist. Lexis 6939, *42-47 (N.D. Ill. 2004) (conducting a gross disproportionality inquiry consistent with the *Towers* analysis). In the other two cases, courts concluded that a civil penalty is not excessive when it falls within the limits prescribed by the authorizing statute. *Newell Recycling Co., Inc. v. U.S. EPA*, 231 F. 3d 204, 210 (5th Cir. 2000); *Kelly v. U.S. EPA*, 203 F.3d 519, 524 (7th Cir. 2000). None of these cases reflects confusion about applying *Bajakajian*; the cases simply reflect lower courts' decisions to consider *different factors* when evaluating gross disproportionality in the context of *different penalties.*

Meadowlake also suggests that lower courts are confused about the relationship between the Court's excessive fines jurisprudence and the Civil Penalty Policy articulated in the federal Clean Water Act, codified at 33 U.S.C. § 1319. But this case does not implicate the Clean Water Act and, even if it did, Meadowlake's concerns are misplaced. The Clean Water Act identifies six factors that a trial court may consider when exercising its discretion to decide the amount of a civil penalty imposed for Clean Water Act violations. *Id.* at § 1319(d). The analysis used to determine the amount of a civil penalty is entirely distinct from the analysis of whether that same penalty violates the Excessive Fines Clause. Moreover, even if a court were to consider some Civil Penalty Policy factors when evaluating whether a fine is "grossly disproportional," that would not indicate confusion about the appropriate test for determining whether a fine is unconstitutionally excessive. The Court in *Bajakajian* established a

gross disproportionality test, but it did not limit lower courts to considering only certain factors when evaluating whether a particular fine is grossly disproportional to the gravity of an offense.

Finally, Meadowlake does not cite a single case where a court has invalidated as unconstitutionally excessive a civil penalty awarded under an environmental statute. Meadowlake's petition references only four cases involving environmental statutes, none of which held that a penalty awarded for violations of an environmental statute was unconstitutionally excessive. See *Newell*, 231 F.3d at 210 (affirming a civil penalty amounting to ten percent of the maximum penalty authorized by Toxic Substances Control Act); *United States v. Production Plated Plastics*, Nos. 93-2055, 93-2618, 1995 U.S. App. Lexis 20539, at *11-13 (6th Cir. July 19, 1995) (per curiam) (unpublished) (affirming a civil penalty amounting to less than two percent of the maximum penalty authorized by Resource Conservation and Recovery Act); *Kelly* 203 F. 3d at 524 (affirming a civil penalty amounting to seven percent of the maximum penalty authorized by Clean Water Act); *United States v. Nevada Power Co.*, No. CV-S-87-861-RDF, 1990 U.S. Dist. Lexis 18998, at *15-19 (D. Nev. June 1, 1990) (finding that a civil penalty of up to $25,000 per day under the Clean Air Act does not violate the Excessive Fines Clause, even where an administrative penalty was imposed in an earlier proceeding). Accordingly, none of these cases supports Meadowlake's claim that either the range of civil penalties authorized by Ohio's Safe Drinking Water Act or the particular civil penalty imposed here violates the Eighth Amendment Excessive Fines Clause.

For these reasons, Meadowlake's efforts to portray confusion among lower courts are misplaced. *Bajakajian* did not articulate specific factors that courts must apply when evaluating proportionality, instead holding only that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." 521 U.S. at 334. Meadowlake does not cite any cases that are inconsistent with the *Bajakajian* standard or suggest confusion about that standard. Accordingly, no controversy or confusion exists among lower courts about whether the Excessive Fines Clause applies to civil environmental statutes authorizing courts to impose civil penalties within a specific range.

C. Meadowlake had a full and fair opportunity to exercise its due process rights where it had ample notice of the trial date and, without justifiable excuse, failed to secure timely representation.

Meadowlake's due process claims fail to present any new question of law and do not merit this Court's attention. In fact, Meadowlake had every opportunity to exercise its constitutional due process rights and forfeited those opportunities by its own conduct.

Due process is founded upon notice and an opportunity to be heard. *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Moreover, "[t]he right to a hearing embraces not

only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938).

In this case, Meadowlake had its first opportunity to be heard at a jury trial on January 9, 2006. *Meadowlake Corp.*, 2007 Ohio App. Lexis 5949, at *6. Meadowlake ultimately forfeited this opportunity by misconduct—the trial court declared a mistrial because Meadowlake's CEO failed to heed the court's admonitions about indoctrinating the jury on matters beyond the scope of the trial. *Id.* at *6. On March 9, 2006, the trial court gave Meadowlake approximately eighty-days' notice of the new trial date—May 30, 2006. *Id.* The trial court confirmed the new trial date on March 23, 2006, and again on May 19, 2006. *Id.* at *8. Meadowlake then had a second opportunity to be heard at the May 30, 2006 bench trial. *Id.*

Meadowlake suggests that in spite of this notice and formal opportunity to be heard, it was not meaningfully able to exercise its due process rights because it was unrepresented during the bench trial and, as a corporate entity, could not represent itself. Although courts must afford parties a meaningful opportunity to exercise due process rights, the parties themselves bear responsibility for taking advantage of that opportunity by exercising their rights. By contrast, if a party of its own volition fails to exercise its right to be heard in an effective manner, the party effectively waives due process. As this Court explained in *Boddie v. Connecticut*, 401 U.S. 371 (1971),

> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication. What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner."

Id. at 378 (internal citations omitted). Meadowlake should not be permitted to waste a court's time by forfeiting its opportunity to present a case at trial, only to argue later that due process was violated.

In this case, Meadowlake had ample notice of the second trial date, and therefore ample time to secure new counsel to participate meaningfully in the bench trial. Meadowlake's counsel sought to withdraw from representation on the same day the trial court announced the second trial date. *Meadowlake Corp.*, 2007 Ohio App. Lexis 5949, at *6-7. Meadowlake did not object to counsel's withdrawal, specifically indicating that it would secure new counsel after Meadowlake's CEO returned to Ohio on April 20, 2006. *Id.* at *7. When the trial court granted counsel leave to withdraw, the court specifically advised Meadowlake that, as a corporate entity, it could not proceed in court without representation. *Id.* at *7-8. The trial court ordered Meadowlake to secure counsel immediately and specifically warned that if Meadowlake chose to

waive representation it would be unable to "file pleadings, present further defense[,] . . . or otherwise represent the interests of the corporate defendants." *Id.* at *8. Meadowlake allegedly contacted potential counsel about the representation, but counsel was unable to represent Meadowlake at the bench trial due to a serious personal injury. *Id.* at *12. Regardless, no counsel entered an appearance on Meadowlake's behalf before the bench trial, filed a motion to continue the trial, or appeared at the scheduled trial. *Id.* at *13. New counsel did not appear on Meadowlake's behalf until after the bench trial concluded, when Meadowlake requested a post-trial evidentiary hearing. *Id.* at *9.

The trial court did not in any way violate Meadowlake's due process rights. In contrast to situations where a court imposes some limitation on a party's ability to advocate, see, e.g., *Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969), Meadowlake's *own* actions limited its ability to advocate on its own behalf. The trial court did not cause the mistrial, refuse Meadowlake admission to the courtroom, or prevent Meadowlake from presenting a defense. To the contrary, the trial court urged Meadowlake to obtain counsel months before the bench trial so it would not forfeit its due process rights. *Meadowlake Corp.*, 2007 Ohio App. Lexis 5949, at *7-8. By failing to hire an attorney in a timely fashion, Meadowlake failed to do what it knew was required to be able to fully and properly exercise its rights.

For these reasons, Meadowlake's due process allegations do not warrant this Court's time or attention.

CONCLUSION

For the foregoing reasons, Meadowlake's petition for writ of certiorari should be denied.

Respectfully submitted,

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December 5, 2008